However, none of the Complainants representatives, including ACTA expert, Mr. Harrelson, recalled discussing this subject at the May 26 meeting. 130/ As a result, Comcast questioned Entergy about its meaning. Entergy explained that "pre-existing conditions" meant only those poles that had been reported by USS to have a violation. Entergy further explained that "exceptions to contractual requirements" would NOT apply to the following: a) all existing poles not flagged as having violations, b) all poles qualifying as for the exception, but that are subsequently modified in any way and c) all new attachments. 131/

This is problematic because USS has been very clear with Complainants on the scope of its work. USS does not purport to find every violation on every pole. 132/ Instead, USS' objective is merely to identify a problem pole and to get Complainants to conduct a comprehensive review of the problems. 133/ This was equally problematic with new attachments. Entergy's last-minute revision to the proposed agreement meant the standards the parties worked hard to develop would not apply to any new attachments. Finally, because USS does not issue

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130/ Harrelson Reply Decl. ¶ 40; Billingsley Reply Decl., ¶ 33; Hooks Reply Decl., ¶ 20.

131/ Harrelson Reply Decl. ¶ 40; Billingsley Reply Decl., ¶ 33; Hooks Reply Decl., ¶ 20.

132/ *See* USS document titled "Comcast Violations by Circuit" dated Dec. 3, 2003, attached hereto as Exhibit 5. ("This report does not attempt to represent every existing violation or descripency [sic]. It is the responsibility of the Licensee to correct all existing violations at the time of correction while not creating any new violation or descripency [sic]." *See also* Billingsley Reply Decl., ¶ 57; Hooks Reply Decl., ¶ 21; Gould Reply Decl., ¶ 20; Allen Reply Decl., ¶ 16.

133/ Billingsley Reply Decl., ¶ 61; Gould Reply Decl., ¶ 20; Allen Reply Decl., ¶ 16.

documentation when it declares a pole violation-free, Complainants would have a difficult time maintaining proof of which pole was subject to which standards. 134/

In his declaration, Entergy's David Inman touched upon this issue, implying that Entergy was accommodating Complainants by including this provision. 135/ In his declaration, Mr. Inman stated: "EAI has attempted to accommodate the Cable Operators in the past by permitting them to remedy past violations by bringing those facilities into conformance with the applicable NESC code." 136/ As with much of Entergy's response, Mr. Inman's statement is very misleading. The truth is that this provision scuttled the deal the parties were on the verge of reaching. 137/

Having reached an impasse, the parties moved on and made significant progress on other outstanding issues related to clearing "past" violations. For example, the parties agreed to a) 12-inch separations in spans between communications and neutral facilities at midspan and b) 30-inch separations between communications and neutral facilities at the poles. The parties discussed other NESC rules regarding guying, marking guys, power supplies and street lights and reached a tentative agreement on these provisions as well. 138/

Entergy also insisted that USS explicitly sign off on every exception to the contract and to EAI's standards on a case-by-case, bolt-by-bolt basis even if the

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134/ Billingsley Reply Decl., ¶ 35; Hooks Reply Decl., ¶ 22; Gould Reply Decl., ¶ 21; Allen Reply Decl., ¶ 16.
135/ Inman Decl., ¶ 35 (Response Exhibit 9).
136/ *Id.*
137/ Harrelson Reply Decl. ¶¶ 45-46
138/ Harrelson Reply Decl., ¶ 41; Billingsley Reply Decl., ¶ 36.

conditions otherwise complied with the NESC. This, as much as any other standard shows that EAI was not the least interested in finding common ground. The lack of cooperation at this June 2004 meeting was starkly different from that at the May 2004 meeting. 139/

That said, the executory agreement represented a significant compromise for Complainants. In addition to the "pre-existing condition" "exceptions" discussed above, Entergy refused to yield on several other important issues. EAI would not agree to provide advance notice to Comcast before creating clearance violations when Entergy added electric facilities too close to communications facilities. 140/ In lay terms, Entergy was reserving the right to create new clearance violations, with respect to Comcast's facilities, without the obligation of notifying Comcast.

Given the positions Entergy has taken in this proceeding, and the fact that the pole agreement requires this notification, Entergy's position was wholly unreasonable. Entergy was requiring Complainants to clear poles of violations while Entergy was itself creating new ones virtually every day. This is exactly what is happening in the field today and exactly why the *status quo* is untenable. Worse, Entergy would like blame Complainants for creating these violations based on its false premise that electric facilities are almost always installed before cable television facilities. 141/

139/ Harrelson Reply Decl., ¶ 42; Billingsley Reply Decl., ¶ 37.
140/ Harrelson Reply Decl., ¶ 44; Billingsley Reply Decl., ¶ 38.
141/ *See* Response ¶ 12, p. 7.

B. Entergy Fundamentally Misconstrues the NESC

1. The NESC is not a "minimum standard"

Entergy's argument that the NESC only sets a minimum standard fundamentally misconstrues the NESC. More accurately, the NESC is the foundation on which all standards must be based. 142/ Note carefully that EAI's expert, Mr. Dagenhart, does not assert that the NESC is the minimum standard, that is an argument made by EAI's lawyers and EAI employees with a direct stake in this dispute. In fact, the NESC Handbook, which is edited by Mr. Dagenhart's business associate Alan Clapp, states that:

> The rules of the NESC give the basic requirements of construction that are necessary for safety. If the responsible party wishes to exceed the requirements for any reason, he may do so for his own purpose but need not do so for safety purposes. 143/

The Handbook also states:

> The 1990 Edition of the NESC was specifically editorially revised to delete the use of the word 'minimum' because of the intentional or inadvertent misuse of the term by some to imply that the NESC values were some kind of minimum number that should be exceeded in practice; such is not the case. 144/

Thus, even Mr. Dagenhart's colleague agrees that the NESC was never intended to be used as a minimum standard. To the contrary, it was designed to set forth standards for safe construction, with the understanding that pole owners may implement additional requirements, but not for safety purposes. 145/

142/ *See* Harrelson Reply Decl., ¶ 49.
143/ Harrelson Reply Decl., ¶ 49; Alan Clapp, NESC Handbook, 5th edition.
144/ Harrelson Reply Decl., ¶ 49; Alan Clapp, NESC Handbook, 5th edition.
145/ *Id.*

It follows, therefore, that Entergy should have some reasonable explanation, aside from safety for imposing its heightened standards. It does not. Instead, Entergy has asserted that Complainants are being unreasonable by refusing to accept any standards in excess of the NESC. This mischaracterizes Complainants' position.

Complainants believe that it is unreasonable for Entergy to reject fundamental NESC provisions specific to communications, including the specific rules governing separations between power and communications facilities at the pole and midspan. Certainly, there are instances where heightened or different standards are appropriate. If a utility is truly interested in a cooperative work environment and in promoting the best use of the poles, it will implement these standards during the design and installation of the pole and electric facilities. In order to make this work, the utility must provide adequate space on the poles so that cable operators are able to comply with the heightened standards. 146/

Entergy, however, either a) did not design its system with poles with the requisite amount of space to make these heightened standards feasible, or b) does adhere to its own standards when placing electric facilities. Both are true. Even where Entergy installs new, taller poles to accommodate its heightened standards, its construction crews very often places its facilities "willy nilly" without regard for the standards USS and Entergy's Joint Use department are trying to enforce. In some egregious examples, Complainants pay for pole replacements to accommodate

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146/ *Id.*

these heightened standards, only to find that Entergy installed its facilities too low on the pole for Complainants to achieve clearance in accordance with Entergy's standards. 147/ For instance, on one recent pole replacement project on Sloan Drive, Comcast shared the pole replacement costs with another attaching party. Entergy replaced the pole, but placed its electric facilities too low, placing Comcast into violation and not leaving enough space for the new attaching party. 148/

For new poles, on a going-forward basis, if Entergy implements the appropriate design and installation standards, Entergy's heightened standards may be workable. However, the NESC must be the foundation for the standards and Entergy must provide the appropriate re-training for its construction crews.

2. The Rules Exceptions Contained In The NESC Are Critical Components To The Rules Themselves

Entergy's argument that exceptions to various NESC rules are optional or otherwise do not carry the full force and weight are wrong. In essence, Entergy and its witness, Mr. Buie, are attempting to shed integral aspects of the Code and standard industry practice under which communications and electric companies have designed and constructed plant for years. Entergy's only basis for this argument is that they are complicated and confusing. This is inconsistent with years of practice and fundamentally misconstrues the nature of the NESC.

NESC Rule 015 (2002 edition) Intent paragraph D states: "Exceptions to a rule have the same force and effect required or allowed by the rule to which the exception applies." Entergy's implication that the exceptions are somehow optional,

147/ *See* Billingsley Reply Decl., ¶ 27.
148/ *Id.*

or not within the scope of the NESC directly contradicts the plain language of the rules. Exceptions to Rules are as much a part of the Rule as the Rule itself. 149/ Undoubtedly, the drafters of the NESC included the exceptions for reasons of operations and safety. Considering that the NESC makes very clear that standards in excess of the Code (which includes exceptions) need not be implemented for safety purposes, no reason exists for rejecting exceptions to rules. 150/

3. Entergy Misconstrues the Grandfathering Provisions of the NESC

Similarly, Entergy's explanation of NESC grandfathering rules is wrong. Although Mr. Buie is correct in stating that the grandfathering provision did not *appear* until the 1977 NESC edition, its *application* extends back to 1960. The 1977 NESC Rule 202.B.2 states: "Existing installations, including maintenance replacements, which comply with prior editions of this code need not be modified to comply with these rules..." All facilities Complainants installed after 1960 are Code-compliant so long as they complied with the requirements at the time of installation. 151/ In other words, although the rule was effective in 1977, it applied to prior editions back to the 6th edition published in 1960. The 6th edition, however, did require installations to be modified to comply with it.

Additionally the 2002 edition of the NES, Rule 013B.1, states: "Where an existing installation meets, or is altered to meet, these rules, such installation is considered to be in compliance with this edition and is not required to comply with

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149/ Harrelson Reply Decl., ¶ 52.
150/ *Id.*
151/ *Id.* ¶ 53.

any previous edition." Therefore, when a new rule goes into effect, compliance with the new rule is compliance with the NESC. The NESC Handbook states: "Rule 013.B.1 now reflects that the latest edition contains the best knowledge of appropriate requirements. If an installation meets the present requirements, it is acceptable regardless of what provisions may have been in effect at the time of its construction. Thus when work on an existing structure is completed, it may meet the current edition requirements or those of a previous applicable edition."

What this means is that Complainants' attachments are in compliance if they meet the requirements of the Code version in effect at the time of installation, or if they meet current Code requirements. At page 65, paragraph 108 of the Response, Entergy complains that Complainants are unreasonable for asserting Code compliance with certain 2002 clearance requirements and also arguing that grandfathering applies. In other words, Entergy takes the position that Complainants can either comply with a prior edition of the NESC or the current edition but not both. This is wrong. Section 013.B.1 makes clear that Complainants position is not only reasonable, but Code-compliant.

4. Complainants' non-conforming attachments are not necessarily "violations"

Further, Entergy has misrepresented many of Complainants' non-conforming plant conditions by calling them "violations." As stated above, the NESC contemplates that parties may wish to implement standards in excess of the Code, but that the end result will not be heightened safety. 152/ Entergy's

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152/ Alan Clapp, NESC Handbook, 5th edition, 2002.

characterization creates the false impression that Complainants are creating unsafe conditions whereas the NESC makes clear that they are not. Ultimately, Complainants are willing to make many of these changes, including bonding on every pole, placing separate anchors for all necessary guys, placing guy markers on all guys, raising (grandfathered) drops at homes and other items. However, it is not accurate for Entergy to suggest that they are safety violations. More important, the mere fact that these non-conforming conditions may exist do not support Entergy's contention that Complainants facilities are hazardous and warrant no further attachments.

a) Bonding

For example, many of the bonding violations Entergy alleges are not true violations. In his testimony, Entergy's witness Mr. Dagenhart correctly explains that the NESC requires four bonds per mile. 153/ In lay terms, this means that out of each mile of plant Complainants construct, they must bond their facilities to four poles. Assuming approximately 24 poles per mile, the NESC requires that Complainants bond one-sixth of their poles. 154/

Of course, Mr. Dagenhart does not assert that failure to bond to *every* pole is an NESC, because it is not. As a result, it is incorrect and misleading for Entergy to argue that Complainants' failure to bond to *every* pole is a violation. 155/ Furthermore, Entergy's claim that it would be too difficult to determine whether

153/ Dagenhart Decl., ¶ 9 (Response Exhibit 6)
154/ Harrelson Reply Decl., ¶ 57.
155/ *Id.*

Complainants had actually bonded to four poles per mile is ridiculous. 156/ Clearly, the Code drafters envisioned that communications facilities could safely attach at four poles per mile. Nothing suggests that this is an unobtainable goal.

b) 12 inches of separation

Another example is Entergy's 12 inch clearance requirement. Less than 12 inches of separation between communications facilities is not an NESC violation. 157/ As explained in the Complaint, the Code first *suggested* that communications facilities maintain 12 inches of separation in the 2002 Code. 158/ Using a proper interpretation of the NESC grandfathering provision, maintaining less than 12 inches is not a violation. 159/

Complainants object to Entergy citing conditions, such as attachments within 12 inches of other communications conductors, as safety violations to justify permitting freezes and inspections. Complainants are willing to comply with heightened standards on a going-forward basis where Entergy designed its facilities to accommodate these extra requirements.

C. Entergy Does Not Have a Clear, Consistent Set of Standards

One of the major problems Complainants have experienced is that there appears to be little consistency among USS, Entergy's joint use staff and Entergy's construction crews. Many of the positions that Entergy takes in its Response do not reflect the realities of the field. Practically speaking, this puts Complainants in the

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156/ *See* Response, ¶ 101, p. 61.
157/ Harrelson Reply Decl., ¶ 63.
158/ Harrelson Initial Report, p. 13 (Exhibit 15 to Complaint).
159/ Harrelson Reply Decl., ¶ 63.

impossible position of trying to comply with and accommodate an ever-changing set of rules. It is unreasonable for Entergy to use Complainants' failure to adhere to these rules as an excuse for either the audit and inspection program or the permitting freeze.

For example, even though Entergy opposes applying the exceptions to the NESC provisions, on at least one occasion, USS applied them to Cox's build in Malvern. On August 12, 2004, Tony Wagoner told Chip Dunlap and Jeff Gould of Cox that he would start applying the exceptions, and said that he did not require sign-off from a Professional Engineer. Up until Entergy filed its Response, Cox had never been told that the exceptions would stop applying, or that USS would require a Professional Engineer to be involved. Specifically, Mr. Wagoner allowed a 12" separation between electric and communications facilities at mid-span. In addition, Mr. Wagoner permitted a 37" at-pole clearance (instead of 40") between communication and electric facilities. Mr. Wagoner stated that, if they could not otherwise achieve the 40" clearance, it was an engineering call he was authorized to make in the field. 160/ These are some examples of reasonable and customary accommodations that are a normal part of joint use operations.

In another example, for years, Entergy permitted Cox to attach its facilities closer than 40" to power and to share anchors. 161/

Similarly, in 2000 and 2001, Cox approached Entergy repeatedly about raising electric facilities over road crossings so that Cox could achieve proper

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160/ Reply Declaration of Chip Dunlap, ¶ 5
161/ *Id.* ¶ 6

clearances. For whatever reason, Entergy crews were uninterested in raising their facilities and gave Cox the verbal approval to "crowd" them. At that time Entergy also instructed Cox to "piggyback" on Entergy's anchors because they did not want Cox setting its own. 162/ Jeff Jech, the manager of the Harrison system had an excellent working relationship with Entergy crews. As a result, Entergy personnel often gave Mr. Jech verbal approval to apply exceptions to clearance requirements. 163/ Again, while perhaps strict code compliance was not maintained, the parties were able to find a safe and workable solution.

Complainants have countless examples of Entergy's willingness to make exceptions to its joint use standards in the field. This should not come as a surprise to anyone. Functional joint use relationships are characterized by this kind of cooperation. It is important for the Commission to understand that the realities of field relations between Entergy and Complainants is painted in shades of gray, not the stark world of absolutes Entergy conveys in its Response. Rather than Entergy's, zero-tolerance approach, the fact is that Entergy has made exceptions to its rules and to the NESC, as a part of the parties' normal relationship. Denying these relationships and penalizing Complainants for their part in them is unreasonable.

Complainants emphasize that they are willing to accept and comply with many of Entergy's heightened standards, including bonding and guying requirements. However, it is unreasonable to impose retroactive penalties on

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162/ *Id.* ¶ 7
163/ *Id.*

Complainants. Entergy must recognize that, just as Mr. Wagoner and other Entergy personnel were authorized to apply the exceptions and to make judgment calls in the field, so were Entergy personnel approving Complainants attachments in the past.

Exacerbating the problem is the fact that Complainants do not have access to Entergy's construction standards. Although Entergy initially stated that it would provide these standards, it reversed its position and refused to produce them. This is a problem for a number of reasons.

First, it is impossible to engineer, build and maintain facilities in compliance with Entergy's standards if the attaching parties do not know what those standards are. Because the ultimate arbiter on these standards in the field is USS, not Entergy, it is very difficult for Complainants to work without an understanding of what Entergy's standards are. For example, it is not unusual for an EAI representative like Gary Bettis to agree to one set of engineering solutions and for a Complainant only to have USS overrule them subsequently. 164/

D. Entergy Has Discriminated Against Complainants

Entergy's approach throughout the audit and inspection program has been to impose different standards on Complainants than other attachers. Although the telephone companies and other cable operators have historically operated under substantially the same terms, Entergy has singled out Complainants for its audit and inspection program. Entergy's claims that it treats all attachers on the same

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164/ Gould Reply Decl., ¶ 30.

terms is false. The truth is that Entergy targeted Complainants—the attachers with the least amount of leverage—to bear the brunt of its plant clean-up costs.

1. Entergy Shows Prefers Attachers That Hire USS

As discussed at Section X, below, USS has been using the audit and inspection program to collect valuable information critical to Entergy's attempt to rehabilitate its plant management records. It should come as no surprise, then, that Entergy has strongly "encouraged" attachers to use USS' services. Complainants, while trying to satisfy Entergy's unrealistic requirements, have observed that Entergy is willing to make more concessions to cable operators that hire USS to perform survey work. 165/

a) Cox

In fact, and as discussed further at Section XI, below, the primary reason that Cox retained USS, both in Entergy's service area and in Jonesboro (which is not Entergy's service area) was because of political pressure from the pole owners. 166/ For example, before Cox engaged USS, Entergy delayed action on make-ready requests Cox submitted in connection with its upgrade. After seeing no substantial progress on its requests for about four months, Cox became very concerned that it was not going to be able to meet its deadlines. At one point, when Cox was complaining about Entergy's pace of the work, Entergy's Gary Bettis stated that perhaps they should hire USS to help improve the pace. To Cox, the message

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165/ *Id.* ¶ 31.
166/ *Id.* ¶ 32

was clear: it would not be able to move forward with its upgrade unless it hired USS. 167/

After hiring USS, Cox's situation improved in that Entergy seemed willing to move the project forward, albeit at an extremely slow pace. However, Cox is far from satisfied with the services USS provides. 168/ Cox's primary complaints about USS are the same as Comcast's and the other Complainants:

1. USS does not identify all violation or non-conforming conditions;
2. USS does not prepare make-ready worksheets for the contractors;
3. Cox must hire UCI to come in and perform a complete inspection, identify all violations or non-conforming conditions and prepare work orders for construction crews; and
4. USS' suggested remediation is often wrong or actually creates violations instead of clearing them. 169/

Whatever progress Cox was able to make after hiring USS came at heavy costs. As discussed in detail at Section X.C., below, USS charges a premium for services Complainants find to be only marginally useful. As with Comcast, for each pole USS inspected for Cox, Cox had to hire UCI to revisit each pole to prepare make-ready work orders. All things being equal, Cox certainly would have

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167/ *Id.* ¶ 33
168/ *Id.* ¶ 34
169/ *Id.*¶ 35.

preferred to engage UCI directly to this work. The only value from USS' work Cox could discern, was the favor it incurred with Entergy by engaging USS. 170/

b) Cebridge

Cebridge is another cable operator in Arkansas (but not a participant in this proceeding) that is building and/or upgrading cable television networks in some of the same service areas as Complainants. Complainants have observed that Entergy is willing to make many procedural, engineering and construction concessions that it refuses to make for Complainants. In fact, many Complainant plant configurations that Entergy asserts are ultra-hazardous, Entergy and USS allowed on this Cebridge project. Ultimately, ACTA and its members are encouraged to see that EAI can be accommodating to communications attachers. It believes strongly that these industry standard procedures and techniques should be extended to all parties.

Moreover, Entergy, in support of USS' GPS and mapping data collection, has alleged that a) Comcast does not have maps b) if Comcast does have maps, they refuse to share them with Entergy and c) if Comcast has shared its maps, they are deficient. 171/ Entergy and USS are currently accepting Cebridge's attachment applications based on Comcast strand maps. Cebridge highlights in yellow Comcast's strand maps and turns these into USS/Entergy as applications. 172/

170/ *Id.*¶ 36.
171/ *See* Response, ¶¶ 351, 531, pp. 180, 242-243.
172/ Billingsley Reply Decl., ¶ 48.

This raises several important points. First, in the past, USS and Entergy had refused to allow Complainants, including Comcast, to submit applications in this method. 173/

Second, Entergy also allows the use of certain construction methods to expedite construction and reduce costs. For example, Entergy permits the temporary use off stand-off brackets. One construction technique is to install stand-off brackets on the poles to help attachers achieve proper clearances. Essentially, attachers affix the brackets in the communications space, perpendicularly on the poles, forming a cross. Instead of attaching to the pole itself, the communications company attaches its facilities to the arms. This is one method of avoiding or deferring a pole change-out or underground construction where there is not enough vertical clearance on a pole. 174/

Whether or not pole owners permit this type of construction varies from pole owner to pole owner. 175/ However, it is discriminatory for a pole owner to permit one attacher to use this method of construction, but not others. Using stand-off brackets has the potential to save an attacher thousands of dollars associated with pole replacements or underground construction. 176/

Further, USS and Entergy permits the build out on this project prior to the telephone companies doing the necessary make-ready work. This is not an unusual

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173/ Billingsley Reply Decl., ¶ 48;
174/ Billingsley Reply Decl., ¶ 49; Gould Reply Decl., ¶ 37.
175/ Billingsley Reply Decl., ¶ 50; Gould Reply Decl., ¶ 38.
176/ Billingsley Reply Decl., ¶ 50; Gould Reply Decl., ¶ 38

practice, 177/ but Entergy has refused to give permission for Complainants to do this. Recognizing that it can often take months to coordinate make-ready among all attachers on the poles, pole owners often allow attachers to make temporary attachments before the make-ready is completed.178/

That Entergy now permits this fairly common practice on this one project (for a non-complainant) is not in and of itself a problem. Indeed, Complainants are encouraged to see Entergy display such flexibility. It should and must be the model for Complainants' and Entergy's relationship going forward.

2. Entergy Does Not Apply The Same Rules to Telephone Companies

Entergy—not SBC—is paying for that portion of the audit Entergy attributed to telephone. 179/ It is wholly unreasonable for Entergy to pay for SBC's share, but not Complainants'. SBC and Alltel are both entering the video market to compete directly with Complainants. 180/ By subsidizing the telephone companies' survey costs, Entergy is granting them competitive advantage over Complainants. This is discriminatory and is unjust and unreasonable.

177/ In its Response, Entergy submitted a letter from a Comcast representative in Georgia to another pole owner, Walton EMC. Entergy Response Exhibit 79. Providing absolutely no foundation whatsoever for the letter, or the context in which it was written, Entergy cites it as evidence of Comcast's pattern of reckless conduct and disregard for safety. This is a gross mischaracterization of the letter. The letter does nothing more than document the exact same practice in which Entergy is itself allowing Cebridge to engage. Entergy's willingness to permit Cebridge to engage in normal industry practices, but not Complainants is discriminatory and is unjust and unreasonable.

178/ Billingsley Reply Decl., ¶51; Gould Reply Decl., ¶ 39.

179/ Response ¶ 225, pp. 123-124.

180/ *See* "Cable, phone companies duke it out for customers," USA Today, May 23, 2005, p. B1; Alltel Corp., 10-Q, filed May 6, 2005, p. 14.

VI. TRUTH NO. 5: PLANT CONDITIONS AND CORRECTIONS CAN BE CATEGORIZED

One of the biggest stumbling blocks throughout this process has been Entergy's refusal to consider poles on anything other than an individual basis. Whereas conditions on each pole may be unique, that does not mean that there are not common conditions that can be addressed categorically. Indeed, that is exactly what the NESC does—its sets forth generally applicable standards that can apply on any pole. The very purpose of establishing standards is so that the parties do not have to address substantially similar conditions on each pole on an individual basis.

Complainants are more than willing to have a Professional Engineer certify that certain recurring conditions are Code-compliant. 181/ However, Entergy's pole-by-pole requirement leads to absurd results. In essence, Entergy has asserted that Complainants must call upon a Professional Engineer to certify that Complainants application of the NESC grandfathering provision and exceptions to Rules are Code-compliant. There is no reason for this. As explained, the Code, including the grandfathering provision and all exceptions to the rules have the full force and effect of the Code.

In other words, Entergy is requiring certification on only certain aspects of the Code. This makes no sense. It is completely arbitrary for Entergy to require P.E. certification for certain Code-compliant conditions but not all. Worse, the

181/ Billingsley Reply Decl., ¶ 18; Hooks Reply Decl., ¶ 14; Dial Reply Decl., ¶ 4.

NESC Handbook makes clear that Entergy need not make these requirements for safety purposes. 182/

What makes even less sense is that Entergy was only willing to accept P.E. certification of grandfathering and certain exceptions to the rules for past violations. 183/ Essentially, Entergy proposes creating two classes of attachments—one where all Code provisions would apply and one where Entergy's modified version would apply. This also does not make sense. If reasonable engineering guidelines do not apply to all past, present, and future attachments, it would be almost impossible to keep adequate records differentiating among the poles. Essentially, the parties' dispute would rage on indefinitely. In the end, the parties could not expect to achieve new levels of trust or cooperation that are so critical. More important, the parties could not expect to achieve a better, safer, more reliable electric plant.

As Mr. Harrelson explains, having a P.E. examine each pole would be much like requiring a medical doctor apply band-aids. A more reasonable approach is for a Complainants to hire a P.E. to oversee the general application of the Code provisions. 184/ In fact, Comcast suggested to EAI at the May 26, 2004 meeting that Comcast would be willing to provide EAI with P.E. certification guidelines upon which the parties nearly reached an agreement, on a circuit-by-circuit basis.

182/ *See* Section V.B.1., *supra.*
183/ *See* Section V.A., *supra.*
184/ Harrelson Reply Decl., ¶ 79.

Comcast offered this approach in lieu of having USS conduct post-construction inspections. Entergy did not accept Comcast's proposal. 185/

Although there may be a place for Professional Engineers to certify certain conditions, it is not the place Entergy advocates in its Response. The more reasonable approach is for Professional Engineers to develop training programs based on the corrections it cites in the field for engineers, construction crews and joint-use administrators. The starting point, however, is establishing reasonable guidelines, based on the NESC. It is critical that the NESC—the whole NESC—is the foundation of any program. The NESC, at its core, is a practical and flexible "living breathing" source of guidance. All provisions, including grandfathering and exceptions to rules are essential elements of the Code and are critical to allowing communications companies and pole owners work through complex issues. 186/

VII. TRUTH NO. 6: ENTERGY IMPOSED A PERMITTING FREEZE

Without question, Entergy imposed a permitting freeze. Entergy's approach is simple. For Alliance and Comcast, the two operators that have been subject to the full USS safety audit, EAI refused to allow them to access additional EAI poles a particular a circuit until they (1) all USS invoices and (2) corrected all safety and non-conforming violations in the circuit. Regardless of how it styles its conduct, Entergy has imposed a permitting freeze, using its control over the poles to force Complainants to acquiesce to its unlawful demands. Entergy's claims that Complainants, particularly Comcast because it is a large company, have leverage in

185/ *Id.*; Billingsley Reply Decl., ¶ 18.
186/ Harrelson Reply Decl., ¶ 82

managing pole attachment relationship is absolutely untrue. The fact remains that Entergy is the ultimate gatekeeper to the poles.

More likely, Entergy's implication is that Comcast, with "deep pockets" 187/ had the leverage to buy its way out of the permitting freeze at any time. However, Congress and the Commission have made clear that access cannot be a shakedown. 188/ But that is what happened; unless Complainants hired and/or paid for USS' services, Entergy shut down access. Not only is this unlawful, but it is discriminatory. As explained in Section V.D.1, below, Entergy permits other companies to continue operations as usual, without paying USS' bills 189/ and without cleaning up all violations and non-conforming conditions in a given circuit.

Finally, in at least one circuit Entergy maximized its leverage by refusing to permit Complainants to attach to any poles until *after* USS conducted its survey in the circuit in question. In that case, Entergy would not permit Comcast to make attachments in the Summerset division until after USS provided survey results. In the end, Comcast could not wait any longer. It performed an overlash project on its existing attachments and made all new attachments underground. 190/ Entergy Comcast made unauthorized attachments in connection with the work in this

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187/ *See* Response, ¶ 190, p. 103.
188/ *Local Competition Order*, ¶ 1123 .
189/ *See* Response ¶ 225, pp. 123-124. Entergy, not SBC is paying SBC's share of audit and inspection charges.
190/ Billingsley Reply Decl., ¶ 52

subdivision. 191/ This is not true. It is long-standing precedent that attachers may overlash existing attachments with notice to the pole owner. 192/

VIII. THE COMMISSION HAS THE AUTHORITY AND EXPERIENCE TO RENDER A DECISION IN THIS CASE

Entergy implies that the Commission has neither the expertise nor authority to address the issues in this case. This is not true. The Commission has decided dozens of similar cases consistent with its Congressional mandate to regulate the rates, terms and conditions of pole attachments in order to curb utility abuses. Entergy's arguments simply attempt to cloak its unjust and unreasonable terms and condition under the mantle of "safety" in an attempt to avoid accountability for its conduct.

A. The FCC Is Uniquely Qualified To Resolve The Complaint

Specifically, Entergy urges the Commission to allow "other agencies possessing greater electric utility and safety expertise than the FCC" to address the issues in this case.193/ Entergy's assertions that the Commission's oversight of pole

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191/ Response, ¶ 422, p. 203.

192/ The Federal Communications encourages unrestricted overlashing and has declared that attachers need not "obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment," although some notice may be reasonable. *Amendment of Rules and Policies Governing Pole Attachments*, 16 FCC Rcd. 12103, ¶ 75 (2001) (hereinafter "2001 Pole Order"), *aff'd Southern Company Services, Inc. v. FCC*, 313 F.3d 574,582 (D.C. Cir. 2002)("Overlashers are not required to give prior notice to utilities before overlashing. However, FCC rules do not preclude owners from negotiating with pole users to require notice before overlashing."); *see also Cable Television Association of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 13 (2003) .

193/ Entergy Response, ¶ 28, pp. 17-18. Oddly enough, while Entergy does not believe that the FCC is knowledgeable enough to address Entergy's behavior with regard to its safety inspections, Entergy nevertheless believes the FCC is qualified

attachments was "carefully circumscribed" to carve out issues relating to plant safety, merely is a thinly-veiled effort to end-run the Commission's exclusive jurisdiction.194/ The Commission has resolved many pole attachment disputes arising from conduct similar to that complained of here.

In *Newport News Cablevision, Ltd. Comm., Inc. v. Virginia Elec. and Power Co.*, 195/ for example, Newport News complained that VEPCO undertook a safety inspection, not for reasons related to cable, but as a means to reengineer VEPCO's own plant. Newport News further contended that "[e]ven if the inspection ha[d] some relationship to cable pole attachments, the inspection procedures used were unreasonable."196 Newport News specifically alleged "that VEPCO's inspection of pole attachments on all poles, regardless of ownership and VEPCO's detailed, physical measurements of clearances between all attachments on poles were unreasonable. . . . Complainant argued that it should not bear the full cost of the inspection because the inspection was beneficial to other poles users. . . ."197

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to "require[] the Cable Operators to remedy [their alleged] safety violations. . . ." Entergy Response, ¶ 29, p. 18.

194 *Id.* at ¶ 22, p. 14.

195 7 FCC Rcd. 9 (1992) (hereinafter "*Newport News v. VEPCO*").

196 *Newport News v. VEPCO*, ¶ 5.

197 *Newport News v. VEPCO*, ¶ 5. The outcome of *Newport News v. VEPCO*, is distinguished from this case. In *Newport News*, the Commission found in the pole owner's favor because the pole owner established a legitimate reason for the inspection, which was safety. As discussed above, the evidence supporting Entergy's safety reasons are false and misleading. Entergy has offered no substitute reasons.

There was no question that the Commission had jurisdiction over the issues in that case.198

Indeed, Entergy should be very familiar with the Commission's jurisdiction. In a similar pole attachment dispute involving Entergy, Entergy attempted to over-charge the cable operator for a counting audit.199 Like the allegations in this case, Entergy had unilaterally engaged an contractor, at a non-competitive rate, and charged the cable operator, CTX, the entire cost. CTX paid the invoice under protest, "in response to representations by Entergy that it would process no further applications for attachment until the invoice was paid."200

Ruling in favor of CTX, the Commission cautioned Entergy that it "cannot engage a contractor to perform a pole count and disregard the cost because CTX is responsible for paying for it."201 The Commission also found that the audit clearly benefited other parties, including Entergy, and required Entergy to refund the over-charges. Moreover, while Entergy's right to conduct the CTX audit may have originated in an otherwise reasonable contract provision, the Commission admonished Entergy in that case that its "practices . . . in implementing the terms and conditions of [an] agreement . . . must be just and reasonable."202

Entergy's attempt to camouflage its unjust and unreasonable conduct in safety terms, is also nothing new and has been rejected by the Commission. For

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198 "No party challenges the Commission's jurisdiction." *Newport News v. VEPCO*, ¶ 4.
199 *See Cable Texas, Inc. v. Entergy Serv., Inc.*, 14 FCC Rcd. 6647 (1999).
200 *Id.* at ¶ 6.
201 *Id.* at ¶ 14.
202 *Cable Texas, Inc. v. Entergy Serv., Inc.* at ¶ 14.